

Roundtable

FIDLEG and Capital Markets Transactions

March 2016



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Duty to Publish a Prospectus and Exceptions

General Duty to Publish a Prospectus

Rule

- A **public offer** for the acquisition of **securities**, or
- seeking the admission of **securities** to trading on a **trading facility**
- Prior publication of a prospectus

Securities

- Shares and bonds
- **New**: derivatives and structured products

Trading facility

- Any stock exchange, or
- any multilateral trading system,
- but not any organised trading systems

General Duty to Publish a Prospectus

Public offer

- Any offer to the public, i.e. any statement to the public that contains sufficient information about the conditions of the offer and the securities
- Current interpretation to continue
 - Limited circle of addressees
 - Rule of thumb: approx. 20 or less addressees

Type of offerings

- Primary offerings
- Secondary offerings

Involvement of the issuer

- Secondary offerings
- If no participation in the public offering of its securities, no duty to cooperate in the preparation of the prospectus

Exceptions

Type of offer

Type of securities

Admission to trading

Customer Segmentation

Private customers

- ✓ All non-professional customers
- ✓ High-net-worth individuals
- ✓ *Professional and institutional customers (opting in)*

Professional customers

Institutional customers

- ✓ Banks, securities dealers, qualified asset managers, fund management companies
- ✓ Insurance companies
- ✓ Foreign customers subject to an equivalent supervision
- ✓ Central banks
- ✓ Public entities and entities with professional treasury operations
- ✓ Pension funds
- ✓ *High net worth individuals (opting out in writing)*

Choices

- ✓ **Opting-out:** High-net worth individuals as "professional customers" (further requirements)
- ✓ **Opting-in:** Professional and institutional customers as "private customers"
- ✓ **Opting-down:** Institutional customers as "professional customers"

Exceptions by Type of Offer

Limited need for customer protection

- Investors that qualify as **professional customers**
- Investors acquiring **securities** for a value of **at least CHF 100,000**
- **Minimum** denomination of **CHF 100'000 per unit**

Limited number of addresses

- Less than **150 investors** qualifying as **private customers**

Limited potential for damages

- **Offer** does not exceed **value of CHF 100,000 over a 12-month period**

Exceptions by Type of Offer

No automatic continuation of the applicability of an exception

- Each public offer for resale of securities is subject to the publication of a prospectus unless an exception applies

No obligation to publish a prospectus for a later public securities offering

- Existence of a valid prospectus, and
- consent to use by issuer or the persons who have assumed responsibility for the prospectus

Exceptions by Type of Securities

Principle

- No protection of investors necessary in cases when investors are equally informed about the securities

Reliance on existing / former prospectus

- Equity securities issued outside the scope of a capital increase in exchange for previously issued equity securities of the same class
- Equity securities issues upon the **conversion** or exchange of financial instruments, e.g. convertible bonds upon conversion
- Equity securities issued or supplied following the execution of a right linked to financial instruments

Adequate other information

- Securities offered in connection with a **take-over**
- Securities offered / allocated in connection with mergers, divisions, conversions, transfer of assets
- Equity securities distributed as dividend
- Employee schemes

Exceptions by Type of Securities

Existing customer protection

- Securities with an unlimited and irrevocable guarantee from the Confederation or cantons, from an international or supranational public entity, from the Swiss National Bank or from foreign central banks

No commercial purpose

- Securities issued by non-profit institutions for raising funds for noncommercial purposes

Mere saving tool / low default risk

- Medium-term notes (*Kassenobligationen*)
- Securities with a term of less than one year (money market instruments)

Derivatives

- Not offered in the form of an issue, e.g. concluded on Eurex

Exceptions Admission to Trading

Based on EU Prospectus Directive

- Equity securities that **over a period of 12 months account for less than 10%** of the number of equity securities of the same category already admitted to trading on the same trading venue
- Equity securities issued **upon the conversion or exchange of financial instruments** or following the execution of rights linked to financial instruments, provided they are equity securities of the same category as those already admitted to trading
- **Securities admitted to trading on a foreign trading venue** whose regulation, supervision and transparency are acknowledged as being appropriate by the domestic trading venue or whose transparency for investors is ensured in another manner
- Securities for which admission is sought for a **trading segment open exclusively to professional clients** trading for their own account or for the account solely of professional clients

Matthias Courvoisier

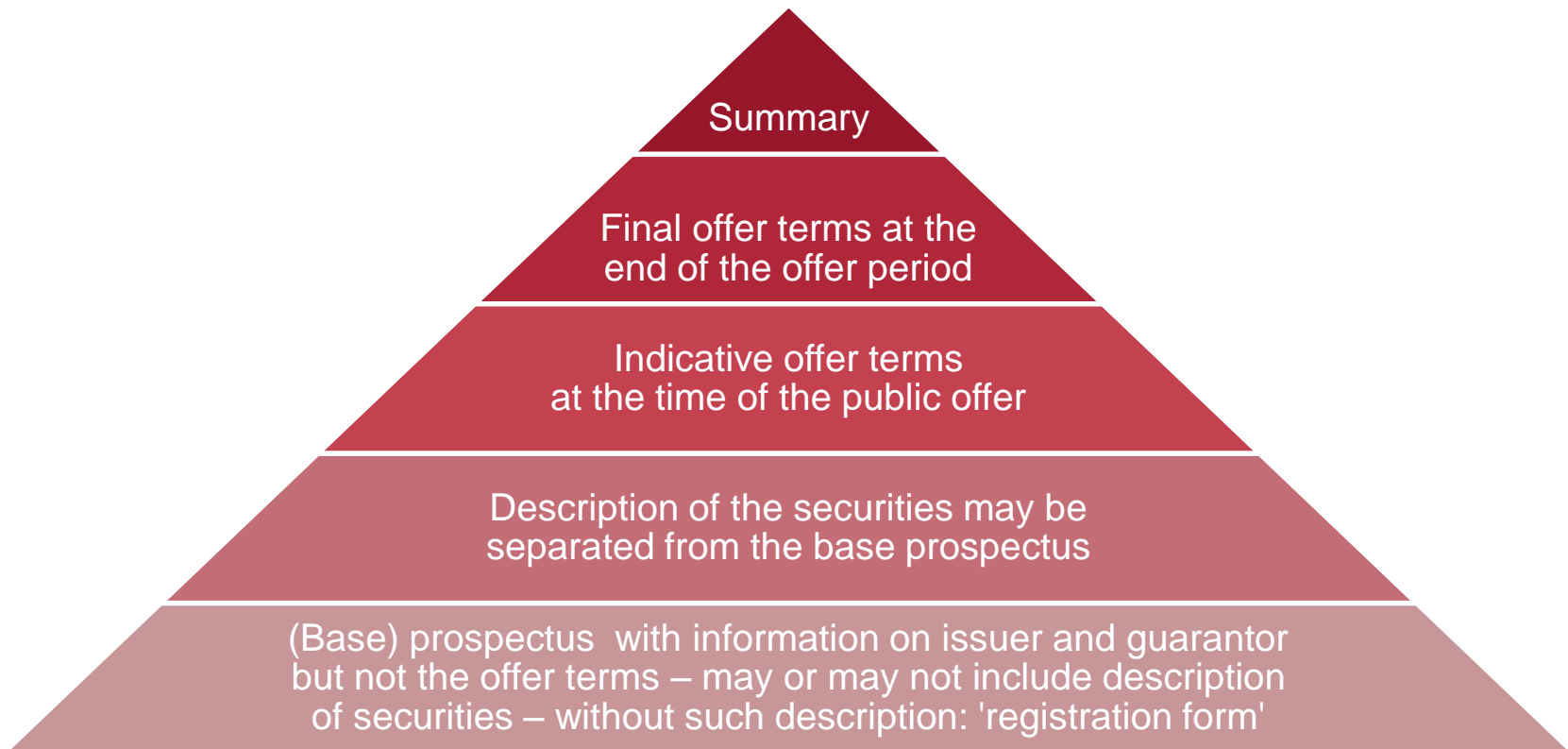
Content, Form and Publication of the Prospectus

Content and Form of the Prospectus



- Details to be set out in an ordinance (art. 48 FinSA) and not in stock exchange rules anymore
- May I rely on the content lists in the ordinance?
- Does the liability risk change since the law provides the content?

Content and Form of the Prospectus



Content and Form of the Prospectus

Language

- German, French, Italian or English

Inclusion by reference

- Will be generally allowed, except in the summary
- Ordinance will certainly limit this, possibly to documents filed with the review body

Exemptions as to certain information may be granted by the review body

- Information that would harm the issuer, provided deletion is not misleading
- Information of minor importance
- Information on traded securities where, for the last three years, the periodic reporting by the issuer was in line with relevant accounting principles

Content and Form of the Prospectus

Exemptions are possible in the following cases –
to be further defined in the ordinance:

Small Issuers that do not exceed
two of the following criteria in the
previous financial year

Total
assets of
CHF 20
million

Turnover of
CHF 40
million

250
employees
on average

Issuers
with small
capitaliza-
tion at the
trading
venue

Rights
issues

Issuers
that submit
offers
regularly

Issuers
that are ad-
mitted at a
foreign re-
cognized
trading
venue

Type of issuers and offers

Content and Form of the Prospectus

- Educated guesses on content:
 - EU or SIX?
 - Business situation and prospects:
 - necessity of an MD&A in more complex cases?
 - necessity of market description and projections?
 - Summary:
 - summary of the risks, just as usual?
 - length of the summary - 7%, max. 15 pages?
 - Will bond prospectuses become more equity prospectus style?

Content and Form of the Prospectus

- Article 41 FinSA as special rule in case there is no prospectus required:
 - Equal treatment of investors with respect to information
 - Necessity to give those investors effective access
- Likely only applicable in case of a public offer

Publication

Form of publication

- Filing with review body
- Publication of prospectus in different media possible
- Published form needs to fully comply with filed form

Time of publication

- At the beginning of the offer
- Issues of new equity securities require minimum term of availability of prospectus of six days

Rules for reference

- Documents that all together form a prospectus need to refer to each other

Supplements

Requirement

- Event occurs or is detected that may significantly influence the valuation of the securities

Procedure

- Prompt notification of review body of the amendment
- Decision by review body within not more than seven calendar days unless topic is exempt from approval process
- Prompt publication after approval and amendment of the summary

Effect

- Revocation of tenders by investors possible
- Extension of offer period to two days after publication of amendment

Philip Spoerlé

Review of the Prospectus and Transitional Rules

Subject of Review

Completeness

Prospectus contains all information according to Article 42 FinSA (information regarding the issuer and guarantor / information on the offer / information on the securities)

Consistency


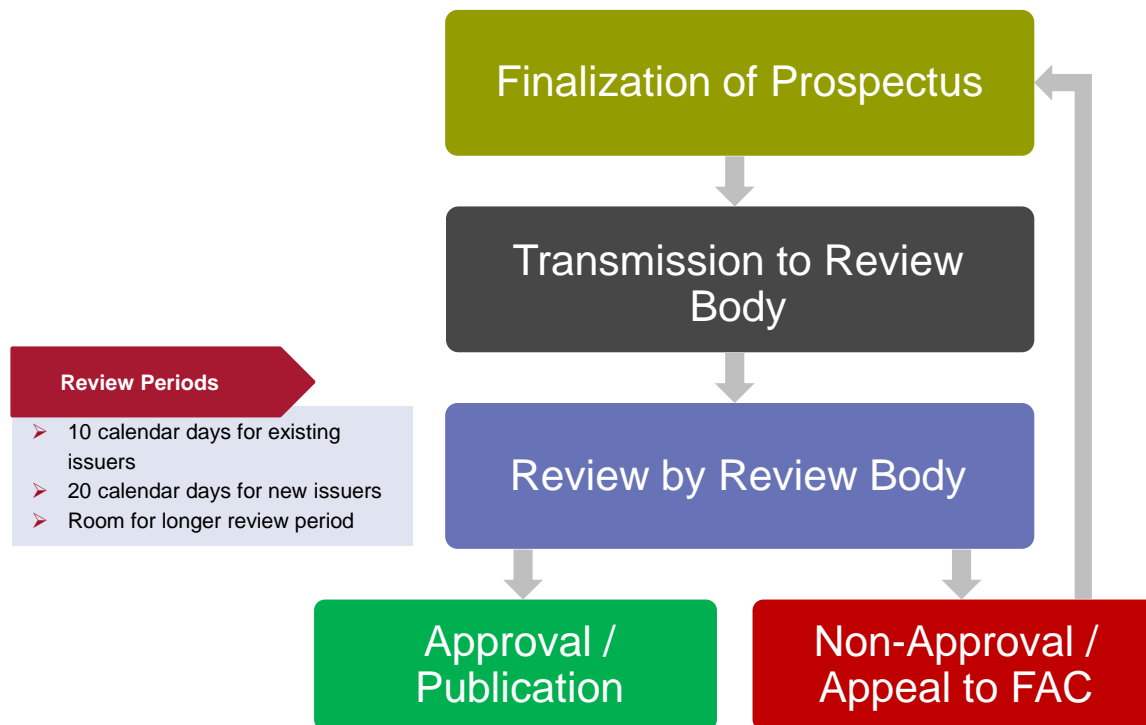
Prospectus does not contain inherent inconsistencies

Comprehensibility

Prospectus is understandable for potential investors

No review of correctness of the content of the prospectus!

Timing – General Process



Conclusion

- Time-to-market will be longer than under current regime
- Risk of non-approval depends upon interpretation of the new regime by review body
- Process is inspired by EUPD regime (*cf.* Article 13 EUPD)
- Liability of review body?

Timing – Exceptions

Post-publication Review

- For certain financial instruments to be defined in ordinance, review process can take place after publication of the prospectus
- Precondition: Bank or investment firm confirms that prospectus to be published contains most important information regarding the issuer
- Fact that no pre-publication review took place has to be disclosed in prospectus
- Exception is expected to apply to bonds

General Exception from Review Process

- No review of prospectuses of collective investment schemes
- Approval of foreign collective investment schemes according to articles 15(1)(e) and 120 CISA remains reserved

Review Body

In General

- Review body needs to be approved by FINMA; one or more review bodies possible (FINMA is likely to appoint only one entity)
- FIDLEG favors appointment of a private entity as review body (as opposed to situation in EU where this task is performed by governmental agencies)

Requirements

- Organisation: Review body has to be organized in a way to ensure the independent fulfilment of its tasks
- Quality Assurance: Review body and its employees have to guarantee the proper conduct of business operations and have the relevant professional qualifications
- **Presumably SIX Exchange Regulations will apply for the review body function**

Validity of Prospectus and Supplements

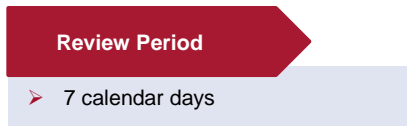
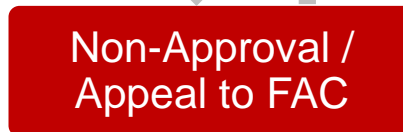
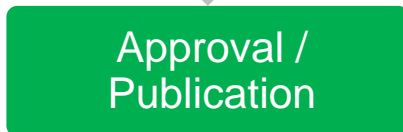
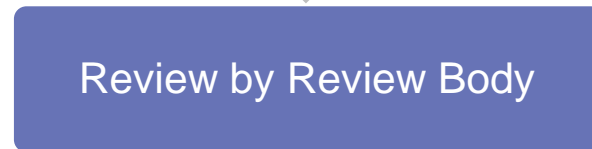
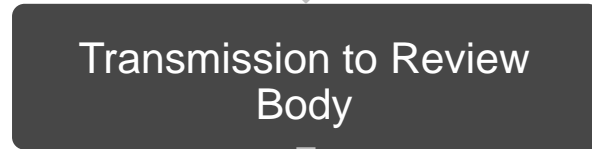
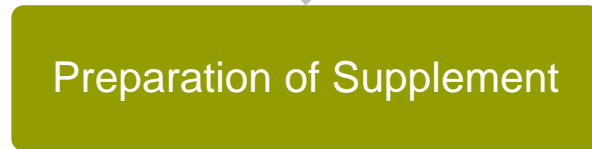
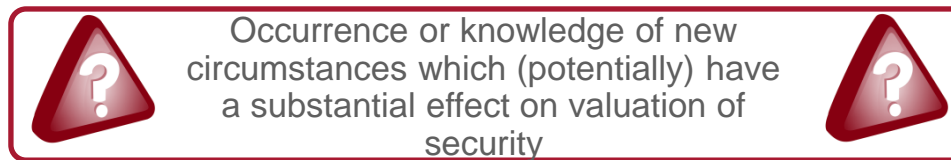
Ordinary Prospectuses

- ✓ Validity of 12 months after approval for same securities of same issuer

Prospectuses of debt securities issued under an issuance programme

- ✓ Validity until no further debt securities will be issued under the relevant prospectus
- ✓ Only for debt securities issued under an issuance programme of a bank or an investment firm

Validity of Prospectus and Supplements



- If supplement is published during public offer period, offer period will be prolonged for 2 calendar days
- Investors may withdraw subscriptions already made until the end of the offer period (see also article 16(2) EUPD)

Validity of Prospectus and Supplements

Content of Supplements

- Change of content of prospectus which is potentially affected by new circumstances
- Change of relevant summary items

Exceptions

- Review body to publish a (not exhaustive) list of circumstances / developments which are not subject to review by the review body
- Supplements relating to excluded circumstances / developments have to be published and transmitted to review body at the same time

Approval of Foreign Prospectuses

On an ad hoc basis

- Review body may approve foreign prospectuses on an ad hoc basis if
 - prospectus has been established according to international standards (e.g. IOSCO International Disclosure Standards for Crossborder Offerings and Initial Listings by Foreign Issuers); and
 - information duties under foreign regime are equivalent to Swiss standards

➤ There is no legal basis that a prospectus reviewed and approved by the Swiss review body will be accepted/passported within the EU – it is in the discretion of each EU member state to accept "Swiss" prospectuses ("Wrapper" solution?)

➤ On the other hand, it is likely that EUPD compliant prospectuses will be generally accepted by Swiss review body

On a general basis

- Review body may approve prospectuses which have been reviewed by review bodies of certain states on a general basis
- Establishment of a list of countries whose prospectuses will generally be accepted
 - List likely to include EUPD and US law compliant prospectuses

Transitional Rules

- After two years from their entering into force, the new prospectus and KID regimes apply
 - to securities which (i) have been publicly offered or (ii) for which a request for the admission to trading on a regulated market has been made before the new regimes entered into force
 - for securities which have been offered to private individuals before the new regimes entered into force

- Potentially significant administrative burden for banks and other issuers issuing securities on a regular basis
- Transitional rules will in particular be relevant for open-end products within the scope of the new regime

Marcel Giger

KID, Liability and Criminal Sanctions

Key Information Document (KID)

Duty

- KID (*Basisinformationsblatt*) required if financial instrument is offered to retail clients (*Privatkunden*)
- Duty with producer (*Ersteller*) of financial instrument, but financial service provider must make available KID to retail clients
- Term "producer" unclear ("*Ersteller sind Personen die ein Finanzinstrument erstellen.....*")
- Producer can delegate to qualified third parties, but remains responsible
- If offer to retail clients on indicative basis: Draft KID with indicative information needed

Key Information Document (KID)

Exceptions

- No need for KID if offering of securities in the form of shares (including similar participation rights)
- No exception for bonds or convertible bonds
- Leads to change in capital markets documentation for bonds
- Equivalent documents under foreign law can be used
- In any case: no approval required

Key Information Document (KID)

Content

- KID must contain essential information so that investors can (i) make a “well-founded” (*fundierte*) investment decision and (ii) compare different financial instruments
- Reference to "well-founded" investment decision problematic (also in view of liability provision)
- Included must be, for example:
 - Risk / Return profile, specifying also maximum loss
 - The cost of the financial instrument

Key Information Document (KID)

Format, Update and Publication

- Stand-alone document distinguished from advertising material
- Must be "easy to understand"
- Duty of producer (*Ersteller*) to regularly check information and update KID in the event of material changes (delegation to qualified third parties possible)
- If public offer: publication same as prospectus
- Further details in ordinance
 - Example Germany: not more than 3 pages (2 if instrument is not complex)

Advertising

- Advertising must be clearly identified as such
- It must refer to prospectus and KID and indicate where these documents can be obtained
- Advertising and other information intended for investors must be "in line" (*übereinstimmen*) with information contained in prospectus and KID
- *Botschaft* refers to Unfair Competition Act, i.e. no "incorrect or misleading information"
- This new provision combined with amended liability provision will increase exposure for advertising
- Covers flyers, newspaper ads, road show material etc.

Liability

- Mainly based on existing liability scheme (existing art. 652a, 752 and 1156 CO will be deleted)
- Covers information that is inaccurate, misleading or not in line with statutory requirements in prospectus, KID or similar communications
- But one main change: "fault" will be presumed by law (against current precedent of Federal Supreme Court and certain part of legal scholars)
- Shifts burden of prove to defendant
- Changes for due diligence defence or due diligence procedure?

Liability

- Information in summaries: Liability is limited to cases where information is misleading, inaccurate or inconsistent when read together with other parts of the prospectus
- Similar concept should apply to KID (currently not foreseen)
- False or misleading information regarding main prospects (*wesentliche Perspektiven*): liability if information has been provided or distributed
 - "despite better knowledge" or
 - without reference to uncertainty regarding future developments (requires typical disclaimer regarding "forward-looking statements")

Criminal Provisions

- Fine not exceeding CHF 500,000 on a person who "wilfully" (*vorsätzlich*):
 - provides false information or withholds material facts in the prospectus or the KID
 - fails to publish the prospectus or KID
- Problematic provision in various respects, *e.g.*
 - No qualification of false information
 - Reference to very broad and not defined terms

Criminal Provisions

- Problematic provision in various respects, *e.g.*
 - Who can be charged? "in particular the issuer" (*Botschaft*) but
 - Other parties could be deemed to "withhold" material facts or to commit a crime due to "non-acting" (*pflichtwidriges Untätigwerden*) in accordance art. 11 Swiss Criminal Code
 - Liability claims would often start with criminal charges
- Would have a big impact on capital markets transactions (*e.g.* increased exposure, due diligence)

Your Team



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Dr. iur. Matthias Courvoisier joined Baker & McKenzie in 1998 after he graduated from the University of Zurich as Master in Law and worked at the Centre for Private International Law for two years as research and teaching assistant.

In 2000, he was admitted to the bar. In 2004 he graduated from London Business School as Master of Science in Finance with distinction. After he returned to Switzerland he obtained his doctorate from the University of Zurich with summa cum laude. Matthias became a partner in 2009. He focuses mainly on advising and representing clients in public and private M&A-Transactions, IPO and other capital markets transactions, and in Finance Litigations. Matthias Courvoisier co-heads the Firm's Capital Markets Practice Group in Zurich.

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Marcel Giger is co-head of the B&M Zurich Capital Markets as well as of the Financial Services Practice Group. He focuses on all legal aspects of capital market transactions, banking and financing matters as well as regulatory compliance issues.

He advises financial institutions as well as corporate clients in transactions within his practice areas.

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Prof. Dr. iur. Lukas Glanzmann joined Baker & McKenzie in 1998 and became a partner in 2004. He concentrates his practice in the areas of loans and credit facilities, restructuring, private equity, mergers & acquisitions as well as capital markets and securities. Lukas Glanzmann graduated from the University of St. Gallen law school and obtained a doctoral degree in the field of corporate law from the University of St. Gallen and a LL.M. degree from Harvard Law School. In 2006, Lukas Glanzmann finished his habilitation and today, he holds the position of a titular professor of business law at the University of St. Gallen. Lukas Glanzmann has published various articles and books in the fields of corporate law and finance, corporate restructuring and corporate governance. Since 2012 he has been a member of the Federal Commission of Experts for the Commercial Register.

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Dr. iur. Philip Spoerlé is an associate in Baker & McKenzie's Zurich office. He studied law and economics at the University of St. Gallen (M.A. HSG in Law & Economics 2011) and Osgoode Hall Law School of York University, Toronto (2009). After his admission to the Zurich bar, Philip Spoerlé obtained his PhD from the University of St. Gallen in 2015 with a doctoral thesis in the area of corporate law.

Prior to joining Baker & McKenzie in February 2015, Philip Spoerlé worked for a global investment bank in the area of fixed income securities trading (2012–2013). He also worked as a teaching assistant at the University of St. Gallen and as a law clerk at Baker & McKenzie Zurich (2010–2012).

His practice mainly focuses on the areas of equity and debt capital markets, derivatives, loans and credit facilities, mergers & acquisitions, corporate restructurings as well as general corporate and commercial matters.

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Dr. iur. Anette Waygood-Weiner joined the Firm's Zurich office as associate in 2010.

She graduated from the University of St. Gallen Law School in 2007 (M.A. HSG). Between 2007 and 2008, she completed her clerkship at Baker & McKenzie and was subsequently admitted to the bar in Zurich in 2009. In 2014, Anette was awarded a doctoral degree from the University of St. Gallen with a thesis on “Inducements and conflicts of interest in the financial services industry”.

Anette focuses on advising international and domestic clients in areas of capital markets and securities transactions, as well as mergers and acquisitions transactions in the financial services industry. She regularly provides legal advice to issuers and investment banks on equity and debt capital market transactions, including ongoing compliance with securities laws and financial regulatory matters. Anette is a member of the Capital Markets as well as the Financial Services Practice Group.

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